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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALBERTO GUILLEN, Defendant and Appellant.	G052022 (Super. Ct. No. 14WF1099) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Karen L. Robinson, Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Luis Alberto Guillen of evading a police vehicle while driving recklessly (Veh. Code, § 2800.2 — count 1), evading a police officer while driving against traffic (Veh. Code, § 2800.4 — count 2), and unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a) — count 3). Defendant admitted having suffered one prior conviction under the three strikes law (Pen. Code, §§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1))[1] and having served three prior prison terms (§ 667.5, subd. (b)). The court sentenced him to eight years in prison, consisting of six years on count 1 (upper term doubled for his prior strike conviction) plus one consecutive year each for two of the prior prison term enhancements.[2] On appeal defendant contends the court (1) violated his constitutional rights by denying his motion for a continuance, and (2) erred by failing to instruct the jury that count 3 could be a misdemeanor pursuant to Proposition 47. We affirm the judgment.

FACTS

On the afternoon of March 7, 2014, Officer Joseph Zane was in uniform in a marked police vehicle, when he spotted a vehicle driven by defendant, and discovered through a license plate check that the vehicle was stolen. Zane tried to stop the vehicle by activating his overhead emergency lights, but the vehicle rapidly accelerated. Zane then activated his siren and pursued defendant.

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] The court also sentenced defendant to a concurrent term of 32 months on count 3 (low term doubled for his prior strike conviction). In addition, the court stayed punishment on count 2 under section 654 and struck for purposes of sentencing one of the prior prison term enhancements.

During this initial part of the pursuit, defendant committed several Vehicle Code violations, including weaving through traffic, making a turn from the wrong lane, driving through a residential area at an unsafe speed, and failing to stop at a stop sign.

Officer Gloria Scott, also in uniform and driving a marked police vehicle, joined the pursuit after hearing Zane's radio dispatch that he was following a stolen vehicle. She too activated her emergency lights and siren during the pursuit. As the officers pursued defendant, he violated the Vehicle Code by driving through a red light without stopping. He also drove into oncoming traffic.

At a dead end, defendant slammed on his brakes, and the vehicle skidded, went over a curb, and crashed into a guardrail. Defendant and another man, who had been a passenger in the vehicle, fled the scene.

Scott pursued defendant, while Zane chased the passenger. Zane apprehended the passenger. After a search by other officers and two police dogs, officers apprehended defendant as well. Defendant was transported to a hospital for injuries sustained as a result of his contact with the police dog.

The owner of the vehicle (who had noticed it was missing from outside his Santa Ana home on the morning of February 23, 2014, i.e., almost two weeks earlier) confirmed he had not permitted defendant or the passenger to take the vehicle.

At trial, Zane and Scott positively identified defendant as the driver of the stolen vehicle. One of the officers who apprehended defendant positively identified him as well.

DISCUSSION

The court properly exercised its discretion to deny defendant's continuance motion.

Defendant contends the court's denial of his January 2015 continuance motion violated his constitutional rights to counsel and due process of law. He claims the ruling deprived his chosen counsel of sufficient time to prepare for trial.

Before defendant made his January 2015 continuance motion, the court had already granted him two prior continuances, resulting in a trial date of Thursday, January 22, 2015.[3] At the trial call on January 22, defendant's appointed counsel — Deputy Public Defender, Madeline L. Berkley — answered "ready" for trial.

Attorney David Nisson then orally requested to become defendant's attorney of record. Nisson informed the court that he had filed a continuance motion.[4]

The prosecutor opposed Nisson's continuance motion. She requested the court, however, to trail the case "until Tuesday or Wednesday of [the] next week" pursuant to her agreement with Berkley.

The court asked Nisson if he would be ready for trial "on Tuesday or Wednesday." Nisson replied that he had "just been given some discovery," and needed to review the discovery to determine whether it was all the discovery, in order to know whether he would be ready for trial on Tuesday or Wednesday. Berkley stated she had given Nisson "all the discovery" at defendant's request.

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[3] All dates refer to the year 2015, unless otherwise stated.

[4] Nisson's written motion, filed that same day (January 22), requested an approximately 45-day continuance. The motion stated that defendant had been trying to retain Nisson as counsel "for the last several months," and had finally saved up the funds to do so only the day before. Consequently Nisson needed time to prepare for trial.

The court trailed the matter to Wednesday of the following week. The court stated it would rule on Nisson's substitution motion at that time and, if it allowed the substitution, it would analyze whether Nisson was ready to proceed or whether the orderly administration of justice had been disrupted.

On Wednesday, January 28, Nisson moved to substitute in as defendant's attorney of record. The court asked Nisson whether he was ready or whether he would instead move for a continuance. Nisson stated his preference would be "to continue and have more time," but, if the only way he could represent defendant was to answer ready, he could "do that" since he had been "given the discovery."

After a recess, the prosecutor and defense counsel Berkley answered "ready" for trial. The court confirmed with the prosecutor that "the nature of this case is [Vehicle Code section] 2800.2" (evading a police vehicle while driving recklessly). The court stated that the matter had been filed almost a year earlier and had been in general jurisdiction since May 2014, and that the trial had been scheduled for October 2014. The court found that, with "both sides answering ready with present counsel," "it would disrupt the orderly administration of justice" if a continuance were granted. The prosecutor confirmed that witnesses had been subpoenaed. The court stated that although defendant had a "right to have counsel of his choice," he had appointed counsel and now both parties were ready to go to trial. The court concluded that, unless it found a compelling reason to rebut its "presumption," based on the record, that the matter was ready to be tried, it would not grant a continuance based solely on new counsel entering the case, because such a continuance would disrupt the orderly administration of justice.

The court asked Nisson whether, if he took the case, he was ready to proceed. Nisson replied, "I can answer ready, Your Honor. I would just point out I was given all the discovery last week by Miss Berkley. I do note that what is still missing are . . . five or six D.N.A. samples submitted to the lab which I don't see any results from. I did get an email from [the prosecutor] last week which indicates there are some medical

records from the hospital where my client was taken which I don't have, but I will answer ready." The court stated it would not allow a continuance unless it found good cause other than Nisson's need for more preparation time because he was new to the case. Nissan stated, "I'll answer ready, Your Honor."

The court allowed Nisson to become defendant's attorney of record, and relieved Berkley. The court placed the parties "on a one-hour on-call status," because no courtroom was available. The case proceeded to trial the morning of the next day.

Under the Sixth Amendment, a criminal defendant who does not require appointed counsel has the right "to choose who will represent him." (*U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 (*Gonzalez-Lopez*).) Indeed, "'chosen representation is the preferred representation. Defendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible.'" (*People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*).) "In addition, counsel, 'once retained, [must be] given a reasonable time in which to prepare the defense.'" (*Id.* at p. 790.) "[E]rroneous deprivation of the right to counsel of choice" is a structural error *not* subject to harmless error analysis. (*Gonzalez-Lopez*, at p. 150.)

But the defendant's right to retain counsel of his choice is not absolute. (*Gonzalez-Lopez, supra*, 548 U.S. at p. 151.) "[E]ven in cases involving the defendant's constitutional right to retain an attorney of his choosing, that right can be forced to yield if the court determines the appointment at issue will result 'in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.'" (*People v. Alexander* (2010) 49 Cal.4th 846, 871-872.) A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness [citation], and against the demands of its calendar [citation]." (*Gonzalez-Lopez*, at p. 152.) A trial court may sometimes "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." (*Ibid*.) "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to

ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.'" (*Courts, supra,* 37 Cal.3d at p. 790.)

Similarly, the right to a *continuance* to facilitate choice of counsel is not absolute. (*Courts, supra,* 37 Cal.3d at p. 790.) Section 1050, subdivision (a) requires criminal cases be heard and determined "at the earliest possible time." To further this goal, a trial court can grant a continuance *only* upon a showing of "good cause." (*Id.*, subd. (e); see also Cal. Rules of Court, rule 4.113 [requiring moving party to present "affirmative proof in open court that the ends of justice require [the] continuance"].) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.'" (*Courts*, at pp. 790-791.) "Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary." (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) Applying these principles, courts will deny last-minute continuances to change counsel where the defendant had a prior opportunity to find and prepare new counsel. (*People v. Reaves* (1974) 42 Cal.App.3d 852, 856; see *People v. Brady* (1969) 275 Cal.App.2d 984, 993-994 (*Brady*).)

We review for an abuse of discretion a court's denial of a defendant's motion for a continuance to enable his retained counsel to prepare for trial. (*Courts, supra,* 37 Cal.3d at pp. 790-791.) "[D]iscretion is abused only when the court exceeds the bounds of reason, all circumstances being considered." (*People v. Beames* (2007) 40 Cal.4th 907, 920.) "Although 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons

presented to the trial judge at the time the request is denied.'" (*Id.* at p. 921.) The defendant bears the burden to show an abuse of discretion. (*Brady*, *supra*, 275 Cal.App.2d at p. 992.) An "order denying a continuance is seldom successfully attacked." (*Beames*, at p. 920.)

We apply these principles here and conclude there was no abuse of discretion. Defendant was represented by the public defender for 10 months before he retained private counsel. On the day of trial, he sought to replace Berkley, who answered "ready" for trial, with a new lawyer. The court had continued trial at least twice at defendant's request. (*People v. Blake* (1980) 105 Cal.App.3d 619, 624 [additional continuance denied where defendant previously "was granted several continuances"].) Defendant's retained counsel, Nisson, answered "ready" for trial the day before the trial actually commenced. Finally, in denying defendant's continuance motion, the court considered the burden that an additional continuance would have placed on the prosecutor (who was ready for trial and had already subpoenaed witnesses) and on court administration. In sum, the court did not abuse its discretion by denying defendant's motion for a continuance for retained counsel to prepare for trial.

This case is distinguishable from *Courts*, where our Supreme Court held the trial court abused its discretion when it refused to grant a continuance to defendant Courts, charged with murder and use of a firearm, to facilitate his representation by an attorney he retained about one week before trial. (*Courts*, *supra*, 37 Cal.3d at pp. 787, 796.) Courts had contacted attorney Swartz and met with him several times to discuss fee arrangements. (*Id.* at p. 787.) At a trial setting conference, Courts' appointed deputy public defender "informed the court that [Courts] wanted a continuance in order to hire private counsel." (*Ibid.*) Courts explained that Swartz was to return that day from vacation and that he and Swartz needed to conclude financial arrangements. (*Id.* at pp. 787-788.) The judge "denied the request, explaining that it was 'too late for coming into court . . . to be asking for another attorney'; [Courts] could not 'wait to the last

minute and say [he wanted] a continuance.' Later that day, [Courts] met with Swartz to discuss fee arrangements. Swartz indicated his willingness to represent [Courts] if 'some sort of continuance' were granted." (*Id.* at p. 788.) Eight days later, on the day set for trial, before another judge, Courts' appointed deputy public defender renewed the continuance motion. (*Ibid.*) Courts declared, "'[T]his is the first case of this magnitude that [the deputy public defender] has tried, and . . . he does not have the experience to properly represent me in this matter.'" (*Id.* at p. 789.) Swartz testified he believed, "in view of the seriousness of the charges, a continuance was necessary to protect [Courts'] right to a fair trial." (*Id.* at p. 788.) The judge denied the continuance motion. (*Id.* at p. 789.) In concluding the trial court had erred (*id*. at p. 796), our Supreme Court stressed that Courts had been "diligent in his efforts (1) to secure counsel of his own choosing *before* the date of trial, and (2) to apprise the court of his wishes at the earliest possible time" (*id*. at pp. 795-796). Indeed, Courts had "conscientiously informed the court of his efforts" (*id*. at p. 791) "more than a week before trial" (*id*. at p. 792). Swartz was on vacation when Courts made his continuance motion at the trial setting conference (*id*. at p. 792), which was only his second request for a continuance in the case (*ibid*.). No "considerations of judicial efficiency" existed, as the courts did not appear to be "particularly congested during this period." (*Id.* at p. 794.)

Here, in contrast, defendant first informed the court of his desire to retain a private attorney on the day scheduled for trial (prior to the case being trailed for six days). Thus, defendant failed to display Courts' level of conscientiousness. Nor did defendant demonstrate the same need for replacing his appointed counsel: The charges against him were less serious than the accusations against Courts. His appointed counsel, Berkley, answered "ready" for trial (with no questions raised about her ability to handle defendant's case), in contrast to *Courts*, where private counsel believed a continuance was necessary to protect Courts' right to a fair trial. Although Nisson did mention he had not received some D.N.A. lab results and defendant's hospital record, he said nothing

about how significant that evidence might be to the defense. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1003, abrogated on other grounds as stated in *People v. Edwards* (2013) 57 Cal.4th 658, 705 [to obtain continuance based on need for further discovery, defendant must "show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time"].) Thus, defendant failed to demonstrate his retained counsel reasonably needed additional time to prepare for trial. Finally, the interests of judicial efficiency weighed more heavily against a continuance in this case than in *Courts*: On the trailed trial date, the case had been pending in general jurisdiction for over eight months; the prosecution had subpoenaed witnesses and was prepared to proceed; and available courtrooms were scarce. The court properly weighed defendant's right to chosen counsel with adequate preparation time "'against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.'" (*Courts*, *supra*, 37 Cal.3d at p. 790.)

But defendant argues the court erroneously applied a presumption in favor of the "rapid and orderly administration of justice," rather than the constitutionally mandated "'presumption in favor of [a defendant's] counsel of choice.'" His assertion the court applied a formal legal "presumption" is based solely on the following statement made by the court on January 28, which we recite in context:

The Court: "Everybody is ready to go. We have the People answering ready. I can only infer that witnesses have been subpoenaed."

The prosecutor: "Absolutely."

The Court: "And although the defendant does have his right to have counsel of his choice, he has had appointed counsel, I can only again infer, for the duration of this. The parties have worked to get this case ready to go to trial. Present counsel obviously was appointed. She's worked to go to trial. The People have worked to go to trial. And unless I find a compelling reason to rebut the presumption that I have

now formulated which is with this record, the missile is ready to be launched, that's my metaphor, it's ready to go. To grant a continuance solely because the new counsel is coming in would disrupt the orderly administration of justice."

Taken in context, defendant has misinterpreted the court's words. A fair reading of this passage shows the court essentially stated that it (the court) had reached a rebuttable factual conclusion (i.e., that the court had formulated its own "presumption" based on its own inferences and the record), that the parties were ready for trial.

In sum, the trial court properly exercised its discretion in denying defendant's continuance motion.

Proposition 47 does not apply retroactively to defendant's commission of taking and driving a vehicle under Vehicle Code section 10851.

Defendant contends that, because his case was not final on Proposition 47's effective date, he is entitled to the proposition's reduced penalty provisions under the retroactivity rule expressed in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). *Estrada* "held that new laws that reduce the punishment for a crime are presumptively to be applied to defendants whose judgments are not yet final." (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*)). Based on *Estrada*, defendant asserts that section 490.2, which was enacted by Proposition 47, applies retroactively to him. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 4-14, pp. 70-74.) Section 490.2 provides that the theft of personal property valued at $950 or less constitutes misdemeanor petty theft. (*Id*., subd. (a).)[5]

From this threshold "retroactivity" contention, defendant formulates his main (and contingent) argument that his conviction for a *felony* violation of Vehicle Code

[5] The Attorney General does not dispute defendant's contention he is entitled to the retroactive application of Proposition 47, and, indeed, fails to mention the *Estrada* issue in her respondent's brief.

section 10851, must be reversed for instructional error. Essentially, he asserts the court erred by failing to instruct the jury sua sponte that he had committed a misdemeanor if (1) he violated solely the *taking* aspect (as opposed to the *driving* prong) of Vehicle Code section 10851, (2) he did so with the requisite intent for theft, and (3) the vehicle's value was $950.[6]

As we shall explain, Proposition 47 does not apply retroactively in this case. Accordingly, we do not reach, and we express no opinion on, defendant's argument that the taking of a vehicle under Vehicle Code section 10851 constitutes theft if the defendant has the requisite intent, and that section 490.2 encompasses the theft of a vehicle valued at $950 or less than.[7]

By default, Penal Code statutes operate *prospectively*, unless the Legislature or the electorate has manifested a contrary intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*); *Conley*, *supra*, 63 Cal.4th at p. 656 [electorate's intent].) "[S]ection 3 provides the default rule: 'No part of [the Penal Code] is retroactive, unless expressly so declared.'" (*Brown*, at p. 319.) *Estrada* did not weaken or modify this default rule of prospective operation. (*Brown*, at p. 324.) Rather, *Estrada* recognized that, in determining whether a statute should be applied retroactively, a court must attempt "to ascertain the legislative intent" by asking, "did the Legislature intend the old

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[6] Specifically, defendant contends the court erred by failing to instruct the jury (1) that the taking of a vehicle under Vehicle Code section 10851 is a lesser included offense of section 487, subdivision (d); (2) that the taking of a vehicle under section 490.2 is a lesser included offense of Vehicle Code section 10851; and (3) that an element of a *felony taking* under Vehicle Code section 10851 is that the taken vehicle's value must exceed $950.

[7] These issues are currently pending before our Supreme Court. (See, e.g., *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793, and *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344.)

or new statute to apply?" (*Estrada, supra,* 63 Cal.2d at p. 744; see *People v. Nasalga* (1996) 12 Cal.4th 784, 792 ["legislative intent is the 'paramount' consideration"].)

In *Estrada*, there was no "textual indication of the Legislature's intent." (*Conley, supra,* 63 Cal.4th at p. 656.) Consequently, *Estrada* inferred "'that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply,' including 'to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final.'" (*Conley*, at p. 656.)

"Because the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature (or here, the electorate) may choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal-law amendments if it so chooses." (*Conley, supra,* 63 Cal.4th at p. 656.) Thus, "when the statute at issue includes a 'saving clause' providing that the amendment should be applied only prospectively," the *Estrada* presumption does not apply. (*Conley*, at p. 656.) Nor does the absence of an express saving clause end the """quest for legislative intent."""" (*Ibid.*) To "express an intent to modify or limit the retroactive effect of an ameliorative change" (*ibid.*), the Legislature or the electorate must simply "'demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it'" (*id.* at p. 657).

The issue before us is whether Proposition 47 (and specifically § 490.2) applies retroactively to defendant. In interpreting the electorate's intent, "we apply the same principles that govern our construction of a statute." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)[8]

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[8] The issue of whether Proposition 47 applies retroactively to defendants whose judgments were not final on November 5, 2014, is currently before our Supreme Court. In *People v. Delapena* (2015) 238 Cal.App.4th 1414, review granted October 28, 2015, S229010, the Court of Appeal held that Proposition 47 is not retroactive (*id*. at p. 364) because it created section 1170.18, which provides for a resentencing petition

Recently, in *Conley*, our Supreme Court held that third strike defendants who were sentenced before the effective date of Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act), but whose judgments were not yet final as of that date, were not entitled to automatic resentencing under the Reform Act, but could petition for recall of sentence and resentencing under section 1170.126. (*Conley*, *supra*, 63 Cal.4th at p. 652.) *Conley* distinguished *Estrada* as follows. "First, unlike the statute at issue in *Estrada*, *supra*, 63 Cal.2d 740, the Reform Act is not silent on the question of retroactivity. Rather, the [Reform] Act expressly addresses the question in section 1170.126, the sole purpose of which is to extend the benefits of the [Reform] Act retroactively. Section 1170.126 creates a special mechanism that entitles all persons 'presently serving' indeterminate life terms imposed under the prior law to seek resentencing under the new law. By its terms, the provision draws no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of prisoners to petition courts for recall of sentence under the [Reform] Act." (*Conley*, at p. 657.) "Second, the nature of the recall mechanism and the substantive limitations it contains call into question the central premise underlying the *Estrada* presumption: that when an amendment lessens the punishment for a crime, it is reasonable to infer that the enacting legislative body has categorically determined that 'imposition of a lesser punishment' will in all cases 'sufficiently serve the public interest.'" (*Id.*, at p. 658.) "The recall procedures in . . . section 1170.126 were designed to strike a balance between [the] objectives of mitigating punishment and protecting

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process and "is functionally equivalent to a saving clause" (*id*. at p. 362). In *People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted September 30, 2015, S228230, the appellate court discerned a "legislative intent not to automatically apply Proposition 47 to persons currently serving sentences for listed offenses" (*id*. at p. 368), but rather to permit their resentencing and release only if a court determines under section 1170.18 that they pose no risk to public safety. (*Id.* at p. 367.) Consequently, *DeHoyos* held Proposition 47 did not apply retroactively to the defendant. (*Id.* at p. 368; see *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900.)

public safety . . . ." (*Ibid.*) The electorate's apparent intent in approving section 1170.126 was "to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors." (*Conley*, at p. 659.)

This analysis applies equally to Proposition 47, which, by enacting section 1170.18, has addressed the question of retroactivity. Section 1170.18, subdivision (a), provides, "A person currently serving a sentence for a [felony conviction] who would have been guilty of a misdemeanor under [Proposition 47] had [the proposition] been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing . . . ." Under section 1170.18, subdivision (b), a petitioner may not be resentenced to a misdemeanor pursuant to the ameliorative provisions of Proposition 47, if "the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Subdivision (f) of section 1170.18 allows persons who have completed a sentence for a felony conviction "who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense" to apply for designation of the felony conviction as a misdemeanor. Thus, section 1170.18 articulates "how the amended law is to apply . . . to cases decided under the prior law." (*Conley, supra*, 63 Cal.4th at p. 662 (conc. opn. of Werdegar, J.).)

Buttressing our conclusion is the following language in *People v. Morales* (2016) 63 Cal.4th 399: "Sentencing changes ameliorating punishment need not be given retroactive effect. '"The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written."' [Citations.] 'The voters have the same prerogative.' [Citation.] [¶] Here, the voters have given Proposition 47 *some* retroactive effect. *Some* persons originally sentenced as felons can receive the benefit of a favorable resentencing." (*Id.* at p. 409, italics added.)

Defendant committed his Vehicle Code section 10851 offense prior to Proposition 47's effective date, although he was tried, convicted, and sentenced after its effective date. In *Conley*, in contrast, the defendant had been sentenced before the effective date of the Reform Act. (*Conley*, *supra*, 63 Cal.4th at pp. 654-655.)[9]

But whether a defendant was sentenced before or after Proposition 47's effective date is not a significant difference as to the issue at hand. For purposes of the *Estrada* rule, the "key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect *when the prohibited act was committed*, applies." (*Estrada*, *supra*, 63 Cal.2d at p. 744, italics added.)[10] Indeed, the defendant in *Estrada* committed his offense prior to the ameliorative amendment of the applicable statutes, but before his conviction and sentence. (*Id.* at p. 743.) *Estrada* made clear that a saving clause may provide "that the old law should continue to operate as to *past acts*." (*Id.* at p. 747, italics added.) If Proposition 47 were applied retroactively to defendants who committed an offense before, but were sentenced after, the initiative's effective date, the result could be "'delay and manipulation in criminal proceedings'"

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[9] In *Delapena* and *DeHoyos* (which held *Estrada's* retroactivity rule does not apply to Proposition 47 and are currently under review by the Supreme Court), the defendants were sentenced before the proposition's effective date. (*Delapena*, *supra*, 238 Cal.App.4th at p. 1421; *DeHoyos*, *supra*, 238 Cal.App.4th at p. 366.) The Supreme Court has indicated that *DeHoyos* presents the following issue, "Does [Proposition 47] apply retroactively to a defendant who was sentenced before the [proposition's] effective date but whose judgment was not final until after that date?" (Cal. Supreme Ct. News Release (Aug. 12, 2016) Summary of Cases Accepted and Related Actions During Week of August 8, 2016.) *Delapena* specified that section 1170.18 sets forth procedures as to persons "'serving a sentence' at the time the initiative took effect . . . ." (*Delapena*, at p. 1427.)

[10] "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Nasalga* (1996) 12 Cal.4th 784, 789.)

(*Conley, supra,* 63 Cal.4th at p. 657), prosecutors prejudiced at the pleading stage, and non-uniform sentencing. Moreover, section 1170.18, subdivision (a), ties the relevance of Proposition 47's effective date to the *time of the offense*: "A person currently serving a sentence for a [felony conviction] who would have been guilty of a misdemeanor under [Proposition 47] had [the proposition] been in effect *at the time of the offense* may petition for a recall of sentence . . . ." (*People v. Mutter* (2016) 1 Cal.App.5th 429, 437 [defendant who committed offense prior to effective date of Proposition 47, but who was convicted and sentenced thereafter, could properly petition for recall of sentence].)

Accordingly, defendant may file a petition for recall of the sentence under section 1170.18, but he is not entitled to a reversal of his conviction. The jury was properly instructed on the law in effect at the time of his offense. Defendant was not entitled to jury instructions based on the retroactive application of section 490.2.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.